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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 86-

VICKIE JEAN RATLIFF PECK,
individually and as Administratrix of the Estate of
HOLLEY MICHAEL RATLIFF, deceased, acting by
and through his heir at law and Administratrix,
Vickie Jean Ratliff,
Petitioners (Appellants Below),

vs.

THE M/V MORRIS HARVEY, M/V #265183,
a registered diesel towboat, MADISON COAL AND
SUPPLY, INC., a corporation, PRIVATE
PLEASURE BOAT WV, 7380, AB, a registered
small craft, PAUL KESSINGER,
Respondents (Appellees Below).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether failure to maintain a bow lookout in conditions of good visibility creates a mere rebuttable presumption of negligence, as ruled by the Fourth Circuit, or constitutes statutory fault, as ruled by all other federal circuits.

2. Whether the District Court violated the rule established by *Moragne vs States Marine Lines, Inc.*, 90 S Ct 1772, 398 U.S. 375, 26 L. Ed. 2d 339, by permitting a defense medical witness to refer extensively to West Virginia's state standards for *prima facie* intoxication in criminal cases and by refusing the petitioners' cautionary instruction which would correctly have advised the jury that plaintiff's decedent had committed no criminal offense under state or federal law by having a blood alcohol content of .022 while a guest passenger on a private pleasure boat.

PARTIES

The parties to this action in the United States District Court for the Southern District of West Virginia were Vickie Jean Ratliff Peck, individually and as executrix of the estate of her husband, Holly Michael Ratliff, deceased, plaintiffs and appellants below, and Madison Coal and Supply Company, M/V Morris Harvey, a registered diesel towboat, Private Pleasure Boat WV 7830 AB, a registered small craft, and Paul Kessinger, owner of Private Pleasure Boat WV 7830 AB, defendants and appellees below.

The petitioners on this petition for writ of certiorari are Vickie Jean Ratliff Peck, individually and as administratrix of the estate of Holley Michael Ratliff, deceased, and the estate of Holley Michael Ratliff, deceased, acting by and through his heir at law and Administratrix, Vickie Jean Ratliff.

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No.

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Respondents (Appellees Below).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS IN COURTS BELOW

The decision of the district court is not reported and is set forth at pages 7a thru 8a of the Appendix to this petition ("App. 7a-8a"). The Court of Appeals' Opinion is not reported and is set forth at Appendix pages 2a thru 6a ("App. 2a-6a").

GROUNDS OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit in this case was dated and entered March 24, 1986.

This Court has subject matter jurisdiction pursuant to 28 U.S. Code 1254, to review the judgment of the Court of Appeals by writ of certiorari granted upon timely petition of a party to a civil action, after rendering of judgment.

CONSTITUTIONAL PROVISIONS AND STATUTES

33 U.S. Code 221

221. Usual additional precautions required generally (article 29)

Nothing in these rules shall exonerate any vessel, or the owner or master of crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect *to keep a proper lookout* or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

(33 U.S. Code 221) (emphasis supplied)

West Virginia Code of 1931, as amended

Chapter 17C, Article 5A, Section 5

§17C-5A-5. Interpretation and use of chemical test.

Upon trial for the offense of driving a motor vehicle on the public streets or highways of this State while under the influence of intoxicating liquor, or upon the trial of any

civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving a motor vehicle while under the influence of intoxicating liquor, evidence of the amount of alcohol in the person's blood at the time of the arrest or of the acts alleged, as shown by a chemical analysis of his blood, breath or urine, is admissible, if the sample or specimen was taken within two hours from and after the time of arrest or of the acts alleged, and shall give rise to the following presumptions or have the following effect:

(a) Evidence that there was, at that time, five hundredths of one percent or less, by weight, of alcohol in his blood, shall be prima facie evidence that the person was not under the influence of intoxicating liquor;

(b) Evidence that there was, at that time, more than five hundredths of one percent and less than ten hundredths of one percent, by weight, of alcohol in the person's blood shall be relevant evidence, but it is not to be given prima facie effect in indicating whether the person was under the influence of intoxicating liquor;

(c) Evidence that there was, at that time, ten hundredths of one percent or more, by weight, of alcohol in his blood, shall be admitted as prima facie evidence that the person was under the influence of intoxicating liquor.

Percent by weight of alcohol shall be based upon milligrams of alcohol per one hundred cubic centimeters of blood.

A chemical analysis of a person's blood, breath or urine, in order to give rise to the presumptions or to have the effect provided for in subdivisions (a), (b) and (c) of this section, must be performed in accordance with methods and standards approved by the state department of health. A

chemical analysis of blood or urine to determine the alcoholic content of blood shall be conducted by a qualified laboratory or by the state police scientific laboratory, of the criminal identification bureau of the department of public safety.

The provisions of this article shall not limit the introduction in any administrative or judicial proceeding of any other competent evidence bearing on the question of whether the person was under the influence of intoxicating liquor. (1968, c. 35)

STATEMENT OF THE CASE

On Sunday, Labor Day weekend of August 31, 1980, at 2:00 A.M., the petitioners' decedent was a guest passenger on respondent Paul Kessinger's disabled pontoon boat, when it collided with the lead barge of M/V Morris Harvey's 595 foot tow, owned and operated by respondent Madison Coal and Supply Co., Inc. The collision occurred just two hours after the Coast Guard had lifted its ban on all commercial traffic on the Kanawha River, imposed due to Charleston, West Virginia's Labor Day regatta. As a result of the collision, two of respondent Kessinger's passengers drowned. The petitioners' evidence established without contradiction several essential facts:

Both of respondent Madison's two watchstanders, pilot Clyde Hammack, Jr., and deckhand/duty engineer Andrew Cogis, were stationed in the M/V Morris Harvey's pilot house, but neither man observed Kessinger's disabled pontoon boat by radar or visual lookout until after the collision. (Appendix, pages 24a & 30a). Both of Madison's watchstanders conceded that there was ample light available from streetlights and other sources to see even an

unlighted small boat drifting in the channel. (Appendix, pages 26a, 27a, 28a & 29a)

There was no lookout posted at the head of the M/V Morris Harvey's 595 foot tow, notwithstanding the repeated radio broadcast of a Coast Guard Notice to Mariners recommending such precaution to commercial towboat operators in congested areas during the Labor Day weekend. (Plaintiffs' Exhibit 22, Appendix page 18a)

Madison's deckhand, Andrew Cogis characterized traffic conditions on the river as "congested" even at 2:00 A.M. and reported that, immediately prior to the collision, there were large numbers of private boats zig-zagging across the river, running up and down river and anchored or moored along both banks. (Appendix page 32a)

At the time of the collision, there existed in front of M/V Morris Harvey's tow a blind spot, invisible to the pilot house, conceded by respondent Madison's expert witnesses to be 70 feet wide and 600 feet long (Appendix, pages 199 and 459). However, according to Coast Guard Captain Kenneth Hofstra's unrebutted calculations, M/V Morris Harvey's blind spot was 965 feet long; thus respondent Kessigner's entire pontoon boat, including its awning, would have disappeared from the view of lookouts in M/V Morris Harvey's pilot house some 200 feet ahead of the lead barge. The pontoon boat's running lights, assuming they were mounted four feet above water would have disappeared from the pilot house's view some 600 feet ahead of the lead barge. (Appendix, pages 41a, 44a, 45a)

The morning after the collision, the Coast Guard's investigator tested the pontoon boat's battery and running lights and found that its lights burned visibly in daylight. (Appendix, pages 36a, 38a)

ARGUMENT

I.

Whether failure to maintain a bow lookout in conditions of good visibility creates a mere rebuttable presumption of negligence, as ruled by the Fourth Circuit, or constitutes statutory fault, as ruled by all other federal circuits.

There exists a split of authority between the Fourth Circuit on one hand and all other federal admiralty circuits on the other as to whether failure to maintain a bow lookout constitutes a mere rebuttable presumption of negligence or a statutory violation of 33 United States Code 221 constituting negligence as a matter of law:

221. Usual additional precautions required generally (article 29)

> *Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect* to carry lights or signals, or of any neglect *to keep a proper lookout* or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

(33 U.S. Code 221) (emphasis supplied)

In the present case, the District Court charged the jury generally as to Madison's duty to maintain a proper lookout, but refused petitioner's motion for a directed verdict and refused petitioner a specific instruction requiring Madison to show that it posted a bow lookout or to justify in a compelling manner its failure to do so. The Fourth Circuit sustained the District Court, ruling as follows:

> *The requirement placed on a vessel operator to maintain a proper lookout does not necessitate, as a flat and unyielding obligation, the unvarying posting of a lookout in the bow of the forward barge. Osaka Shosen Kaisa, Ltd. v. Angelos, Leitch & Co.,* 301 F.2d 59, 61 (4th Cir. 1962) ("the question of the sufficiency of the lookout in any instance is one of fact, to be resolved under the attendant circumstances. . . ."). *Furthermore, breach of the duty to post "proper lookout" is not the equivalent of a statutory violation. E.A. Anthony v. International Paper Co.,* 289 F.2d 574, 580 (4th Cir. 1961).
>
> . . . . .
>
> Moreover, the furthest that the authorities go in support of the appellants' position is to hold that the failure to post a proper lookout raises an inference, albeit a strong one, imposing a burden on the operator of the vessel to demonstrate that any resulting breach of duty did not contribute to the accident. *District v. Lauritzen,* 404 F.2d 1001 (4th Cir. 1968); *Esso Standard Oil Co. v. Oil Screw Maluco I,* 332 F.2d 211, 213 (4th Cir. 1964)
>
> (Unpublished *Per Curiam* Decision decided March 24, 1986) (Emphasis supplied)

Contrary to the Fourth Circuit's ruling, the failure of M/V Morris Harvey to maintain a special lookout on the extreme forward barge of its tow should constitute statutory fault under the prior decisions of the United States Supreme Court. A powered vessel which fails to maintain a vigilant lookout at the extreme forward part of the vessel at night in a position best adapted to descry approaching vessels at the earliest possible moment is in fault, and the pilot house is not the proper place to maintain an effective lookout. (*St. John v. Paine* (1850) 51 U.S.

557, 13 L. Ed. 537); *The Tillicum* (1916) (CA9 Wash) 230 F. 415; *The Surf* (915) (D.C. Mass) 230 F. 485. A powered vessel proceeding up river in a narrow channel containing a fleet of river craft is at fault in failing to post, aside from the man at the wheel, a proper lookout at the forward part of the vessel. (*Newton v. Stebbins* (1850) 51 U.S. 586, 13 L. Ed. 551). Powered vessels navigating in thoroughfares of commerce must have constant and vigilant lookouts, properly positioned, and elevated positions such as hurricane decks are not as favorable as those near the vessel's stem. *Haney v. Baltimore Steam Packet Co.* (1860) 64 U.S. 287, 16 L. Ed. 562; *The Ottawa* (1866) 70 U.S. 268, 18 L.Ed. 165; *The Wanata* (1877) 95 U.S. 600, 24 L. Ed. 461. A competent lookout must be stationed at the vessel's bow whenever physically possible. *The Belgenland* (1885) 114 U.S. 355, 29 L. Ed. 152, 5 S. Ct. 860; *The Choctaw* (1921) (C.A. 6 Mich.) 270 F. 114; *The Campania* (1927) (D.C. La.) 21 F2d 233 (Steamship in fault for failing to place lookout as low and as far forward as possible) *A/S Skaugaas v. T/T P.W. Thirtle* (1964) (D.C. Md.) 227 F.S. 281 affirmed (C.A. 4 Md.) 345 F.2d 275, *cert. den.*, 382 U.S. 918, 15 L.Ed.2d 233, 86 S.Ct. 292 (The vessel should have maintained proper lookout forward where her bridge was 450 feet aft of her stem).

The District Courts, sitting in admiralty, have repeatedly found that tugs pushing tows do not constitute a special case exempt from posting a forward lookout. (*Clary Towing Co. v. Port Arthur Towing Co.* (1973) (E.D. Tex.), 367 F.S. 6). On the contrary, where a tug is pushing a sizeable tow, the lookout should be posted on the extreme forward portion of the tow. *The Edward G. Murray* (1916) (C.A. 2 N.Y.) 234 F.61; *Gulf Oil Corp. v. The Socony No. 16* (1947) (C.A. 2 N.Y.) 162 F.2d 869 (Barge liable for collision with tug where, had lookout been posted on lead

barge at time of collision, it was reasonable to believe that the other vessel would have been seen so that a timely signal could have been observed by a bow lookout); *The Pennsylvania* (D.C. N.Y.) F Case No. 10,949 (A lookout should be maintained on the tow, particularly where the tow projects well ahead of its tug); *The Lyndhurst* (1899) (D.C. N.Y.) 92 F. 681; *The Authentic* (1929) D.C. N.Y. 37 F.2d 352 (Tug at fault for proceeding at night with two loaded car floats projecting ahead of her without a lookout on the forward edge of its tow); *The LeHigh* (1935) (D.C. N.Y.) 12 F.S. 75 (When lead barge was located 800 feet ahead of the tug, the lead barge should have had a lookout stationed aboard); *Cocks v. The Tonawanda* (1880) (D.C. R.I.) 3 F. 588 (The absence of a watchman on the tow was a culpable omission).

Respondent Madison Coal Company cannot evade culpability by arguing that a forward lookout on its tow could not have seen the pontoon boat in time to avoid the collision. Both Madison's pilot and duty deckhand testified that there was plenty of light on the river to see unlighted small boats:

PILOT HAMMACK - REDIRECT

Q. Mr. Emch asked you that evening if you were putting the boat where you wanted it to go. *You saw a small boat between the Elk River and the South Side Bridge, did you not, sir?*

A. *Yes.*

. . . . .

Q. *He was out in the channel stationary?*

A. *Yes, he was.*

Q. And you stopped for him?

A. Yes.

Q. *And you had no trouble seeing him?*

A. *No, I didn't.*

(Appendix page 26a)
(emphasis supplied)

DECKHAND COGIS - DIRECT

Q. Do you remember what the reason was for stopping the tow at that point?

A. Yes, sir, there was a pleasure cruiser out in the middle of the river and just floating there with no lights on.

Q. *Were you able to see the pleasure cruiser with no lights on out in the middle of the river okay?*

A. *Yes, sir.*

Q. *Was there light on the water from various sources?*

A. *Yes, sir.*

Q. *Did the street lights along the banks of the river add to the reflection of light down on the surface?*

A. *Yes, sir they did.*

Q. *As far as you were concerned, was there adequate light to see by with the naked eye?*

A. *Yes, sir.*

Q. Were the weather conditions clear?

A. Yes, sir.

Q. Any fog at all?

A. No, sir.

Q. No rain, no drizzel (sic)?

A. No rain, no drizzel (sic), sir.

Appendix, page 28a,
page 29a,
(emphasis supplied)

It is well established that a vessel is in fault for a collision where even though it is night, with a proper lookout, the vessel struck could have been seen in time even though she showed no light. (*Cushing vs. Owners of The John Frazer* (1858) 62 U.S. 184, 16 L.Ed. 106; *The Ariadne* (1872) 80 U.S. 475, 20 L.Ed. 542; *The Verona* (D.C. Va.) 1933 AMC 169 (Steamer found in fault for failing to keep a proper lookout even where motorboat she ran down had no fixed stern light); *The Mercere* (1916) (C.A.2 N.Y.) 234 F.2d 59; *the O'Brien Bros.* (1919) (C.A.2 N.Y.) 258 F. 614 (Tug found at fault in colliding with motorboat for failing to maintain forward lookout where other observers on scene could see the hazard and a competent lookout on tug should have been able to see it also).

All aboard the pontoon boat who survived testified that she was showing running lights and the Coast Guard's investigation established that her running lights were in operating condition after the collision and that her battery carried sufficient charge to make them burn visibly in daylight. (Appendix, pages 26a, 36a).

LT. ARN HEGGERS, U.S. COAST GUARD - DIRECT

Q. You got to the scene of the accident what time in the morning?

A. At daylight. I don't recall specifically the time.

Q. *When you got there you tested the lights on board Mr. Kessinger's boat and the red and green running lights were operative?*

A. *Correct.*

(Appendix, page 36a).

LT. ARN HEGGERS, U.S. COAST GUARD - REDIRECT

A. All right. I understand and I want to make sure when you tested the running lights the red and green lights, *there was sufficient energy at the present time in the battery to make those lights burn?*

A. *Correct.* Now whether or not, like I say they met the requirements of the regulations as to distance and visibility, I don't know.

Q. Right. And you did this *but there was enough energy in the battery to make them light up and you to see this, even in the day time?*

A. *Right.*

(Appendix, page 38a)
(emphasis supplied)

The Fourth Circuit cases of *Esso Standard Oil Company v. Oil Screw Maluco I, supra, Chesapeake Bay Bridge and Tunnel District v. Lauritzen, supra,* and *Anthony v. International Paper Company, supra,* should be overruled and the Fourth Circuit's lookout requirement should be conformed to the status of statutory violation it is accorded in all other United States Circuits. In the case of *Anthony v. International Paper Company, supra,* the Fourth Circuit considered the following factual situation. A tug was proceeding toward port shortly after dark with only five men on board of its normal complement of seven men. Four of them were below at supper when the casualty occurred. Only the captain, who was piloting the tug, was on watch, and there was no lookout stationed at the head

of the tow. The tug's captain spotted a small boat about 250 feet off his port bow which he swamped with his wake, drowning all four persons on board. The Fourth Circuit expressly declined to follow the First, Second, and Fifth Circuits (See cases cited, *supra*) which make failure to post a bow lookout having exclusively lookout duties a non-rebuttable statutory fault:

> It is true that in numerous cases it has been held that a vessel in motion in a traveled area should have a lookout at the location on the vessel, *usually in the bow,* best suited to see and hear an approaching object *and that the lookout should have no other duties, particularly such as those which devolve upon the pilot or others on the bridge.* See the authorities assembled in *Osaka Shosen Kaisha, Ltd. v. The Elene,* D.C. Md., 190 F. Supp. 201.
> (*Anthony v. International Paper Company* (C.A.4, 1961) 289 F.2d 574 at page 580) (emphasis supplied)

The Fourth Circuit then attempted to distinguish extensive First, Second and Fifth Circuit caselaw making failure to post a proper forward lookout an absolute statutory fault. (*Zigler Co. v. Barker Barge Line* (C.A. 5), 167 F.2d 676; *Smith v. Bacon* (C.A. 5), 194 F.2d 203; *Parker Bros. & Co. v. DeForest* (C.A. 5), 221 F.2d 377; *Ulster Oil Transportation Corp. v. The Matton No. 20* (C.A. 2), 210 F.2d 106; *Ira S. Bushy & Sons v. United States* (C.A. 2), 172 F.2d 447; *Gulf Oil Corp. v. The Socony No. 16* (C.A. 2), 162 F.2d 869; *Afran Transport Co. v. The Bergechief* (C.A. 2), 274 F.2d 469; *Dwyer Oil Transport v. The Edna M. Matton* (C.A. 2), 255 F.2d 380. In reversing the lower court's rulings, in *Anthony,* the Fourth Circuit rationalized its rule as follows:

> We do not, however, *minimize the duty* of a vessel to have a proper lookout. On the contrary, we hold that the omission to perform this duty is so grave a default as to give rise to a strong inference that it contributed to the accident and to impose upon the vessel the heavy burden to show by clear and convincing evidence that it did not so contribute. Such a holding is surely justified in view of the more drastic rule laid down by experienced admiralty courts as a necessary safeguard for careful navigation. Accordingly, the jury should have been instructed in the pending case that if they found that the lookout duty was not properly performed by the tug, the burden rested upon it to exculpate itself from liability. (*Anthony v. International Paper Company* (C.A.4 1961) 289 F.2d 574 at page 581)

In the later case of *Esso Standard Oil Company v. Oil Screw Tug Maluco I,* the Fourth Circuit followed *Anthony,* again distinguishing the extensive caselaw of the First, Second and Fifth Circuits. *Esso Standard Oil Company v. Oil Screw Maluco I* (C.A. 4 1964) 332 F.2d 211. in *Esso Standard,* the night was clear, the vessels in plain view of each other for more than two miles, and each showed proper navigational lights. The tanker had failed to post a bow lookout and was extensively using her searchlight just before and just after transiting the strait. The tug claimed the tanker's searchlight blinded the tug's pilot until just before the collision. The tug had failed to post a lookout on the forward end of her tow. The Fourth Circuit made the following concession regarding the absence of a forward lookout on the tow:

> With the liability of the tanker admitted, the next inquiry is the behavior of the tug. *She was at fault in many respects, but none so flagrant as*

> *the absence of a special lookout on the scow* or at least in not otherwise providing sufficient observation when nearing the dam.
> (*Esso Standard Oil Company v. Oil Screw Tug Maluco I*) ((C.A. 4 1964) 332 F.2d 211 at page 213) (emphasis supplied)

The Court quoted with approval language from *Anthony v. International Paper Company, supra,* to the effect that failure to post a bow lookout in that case was so grave a default as to give rise to a strong inference that it contributed to the collision and shifted to the delinquent vessel the burden of showing by clear and convincing evidence that its failure to maintain a proper bow lookout did not contribute to the collision. The Court conceded that the absence of a special lookout on the tug's scow was a grievious deficiency which sorely limited the tug's vision:

> With this limited vision (*i.e.,* no special lookout on her scow) the tug was not able to keep the vigil contemplated by the requirements of a "proper lookout." *A myopic tug with a protruding and displaced tow had no place in a narrow channel at midnight.* (Id. at page 214) (emphasis supplied) (parenthetical insertion made by petitioner herein)

In the present case, the respondent Madison Coal and Supply Company contended that its failure to post a bow lookout was excused because respondent Kessinger's pontoon boat lacked lights, a matter in vigorous contention. Even if this were so, both Madison's watchstanders admitted that there was sufficient visibility from the highway lights lining the Kanawha River to detect an unlighted pleasure boat drifting in the channel. (Appendix, pages 26a, 27a, 28a)

The United States Supreme Court has found a vessel to

be in fault for colliding with a vessel showing no lights where a properly efficient lookout should have seen the unlighted vessel in time to avert the collision. *Cushing v. Owners of The John Fraser* (1858) 62 U.S. 184, 16 L.Ed. 106; *The Ariadne* (1872) 80 U.S. 475, 20 L.Ed. 542. In the *O'Brien Bros.*, a tug was found at fault after colliding with a motorboat for not maintaining an efficient lookout where other observers on the scene were able to see the hazard and a competent lookout, properly stationed, should have been able to see the hazard while collision was still avoidable. The *O'Brien Bros.* (1919) C.A.2 N.Y.) 258 F.614); see also *The Verona* (D.C. Va.) 1933 AMC 169. The pilot and duty deckhand of M/V Morris Harvey, stationed on the port and starboard wings of the enclosed bridge, both admitted that they did not detect Kessinger's boat, either visually or by radar, until after the collision. (Appendix, pages 24a and 32a).

Where there is nothing to interfere with vision, the fact that the other vessel is not seen is all that is necessary to impute negligence to the lookout. (*Central Navigation Corporation of Monrovia, owner of S.S. Georgel, Libellant, v. M/V Atlantic Sun and Oil Company,* 245 F.S. 537 at page 545; see also *The Pavonia,* 26 F. 106 (S.D.N.Y.) (1885). See also Judge Boreman's dissenting opinion in the Fourth Circuit case of *Dalldorf v. Higgerson-Buchanan, Inc.* (C.A. 4 1968) 402 F.2d 419 at page 424; *The Mercere* (1916) (C.A.2 N.Y.) 234 F. 259 (Vessel at fault for not seeing approaching vessel until within 600 feet where there was no fog or falling snow to obscure visibility).

Petitioners were entitled to Plaintiff's Requested Charges #4, #9, instructing the jury that, under the circumstances of this case, Defendant Madison's failure to obey the Coast Guard Notice to Mariners by posting a lookout at the head of its tow constituted negligence proximately

contributing to the collision. (Appendix, pages 14a, 15a, 16a).

In the present case M/V Morris Harvey collided with defendant Kessinger's drifting boat on the right front quarter of its tow, an area within the lookout responsibility assumed by pilot Clyde Hammack, who was stationed on the right side of the pilothouse oberving the radar screen and performing pilot's duties while deckhand Andrew Cogis was stationed on the left side of the pilot house observing the port side of the tow. (Appendix, pages 31a and 32a.)

A helmsman or person stationed on the bridge or in the pilot house is not a proper lookout. *The Ottawa* (1866) 70 U.S. 268, 18 L.Ed. 165; *The Captain Weber* (1898) (C.A. 9 Cal.) 89 F. 957; *The Pilot Boy* (1902) (C.A. 4 S.C.) 115 F. 873; *Dahlmer v. Bay State Dredging and Contracting Co.* (1928) (C.A.1 Mass.) 26 F.2d 693; *The Henry C. Rowe* (D.C. N.Y. 1982 AMC 1624, affirmed (C.A.2 N.Y.) 35 F.2d 742. And a tug with a tow does not comply with 33 U.S. Code 221 simply because the officer in charge looks out from the pilot house. (*Intagliata v. Shipowners and Merchants Towboat Co.* (1945) 26 Ca. 2nd 365, 159 P.2d 1) In *Anthony v. International Paper Company,* the captain of the tug served as its sole lookout from its enclosed pilot house while also performing the duties of pilot and helmsman (*Id.*, at page 576-577), the rest of the crew being at supper. On appeal, the plaintiff vigorously contended that the pilot or helmsman could not, as a matter of law, simultaneously perform the duties of a lookout and the duties of helmsman/pilot from the pilot house. Following its non-statutory fault rule, the Fourth Circuit looked to the facts of the case, noting the following factors which it said made a jury question of the adequacy of the tug's lookout:

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> There was, in the first place, the testimony of the master of the tug that there was fair visibility ahead of his vessel and yet he did not see the motorboat until it was almost abreast the bow of the tug on the port side. He stressed the failing light between sunset and dark prevailing at the time and the difficulty of seeing the unlighted boat against the background of the river bank; but testimony given on behalf of the plaintiff showed that it was still possible to see an unlighted object on Sandy Island one and a half miles away.
> (*Anthony v. International Paper Company* (C.A.4 1961) 289 F.2d 574 at page 579)

The Fourth Circuit ruled in *Anthony* that the District Court correctly refused to instruct the jury that the duty to post a sufficient lookout was inadequately performed, since it was undertaken by the master of the tug in addition to other duties; it found, however, that the lookout instruction actually given by the District Court did not adequately focus the jury's attention upon the tug's duty to maintain a proper lookout:

> Accordingly, the jury should have been instructed in the pending case that if they found that the lookout duty was not properly performed by the tug, the burden rested upon it to exculpate itself from liability. *The failure to give such a charge was particularly prejudicial in the present case, because the attention of the jury was not specifically called by the judge to the fact that the tug did not have an independent lookout* . . . (*Id.* at page 581) (emphasis supplied)

This is exactly the situation in the present case, since the jury was given no more than a general idea of respondent Madison Coal Company's duty to maintain an "adequate

lookout." Compare the Fourth Circuit's relaxed view toward bow lookouts with that of the Second Circuit in *Complaint of Interstate Towing Company v. Stissi,* in which the Second Circuit made the following stern oberva-tion:

> *It is axiomatic that an "inefficient lookout is equivalent to none." Sun Oil Co. v. S.S. Georgel,* 245 F. Supp. 537, 545 (S.D. N.Y. 1965) aff'd 369 F.2d 406 (C.A. 2 1966) (*per curiam*) See the *Robert H. Inc. v. The Socony No. 19,* 162 F.2d 199, 200 (C.A.2 1947) *A proper lookout is one that is vigilantly maintained by a competent person of suitable experience. Chamberlain v. Ward.* 62 U.S. (21 How.) 548, 570, 16 L.Ed. 21 (1859); *Tug Ocean Prince, Inc. v. United States,* 584 F.2d 1151, 1159-1160 (C.A.2 1978) cert. den. 440 U.S. 959, 99 S.Ct. 1499, 59 L.Ed.2d 772 (1979); *In re Flota Mercante Grancolombiana, S.A.,* 440 F. Supp. 704, 715-17 (S.D. N.Y. 1977) . . . *The need for competent vigilance has prompted repeated holdings that a lookout's sole duty should be that with which he is charged and that one who is assigned the duties of helmsman is not a proper person to act as a lookout. Chamberlain v. Ward, supra,* 62 U.LS. at 571, 16 L. 1Ed. 211; *Tug Ocean Prince, Inc. v. United States, supra,* 548 F.2d at 1159-60; *The Pilot Boy,* 115 F. 873, 875 (C.A.4 1902) (*Complaint of Interstate Towing Co. v. Stissi*) (C.A.2 1983) 717 F.2d 752 at page 755. (emphasis supplied)

The Fourth Circuit readdressed the issue of lookouts having other duties in the case of *United States v. S.S. Soya Atlantic,* in which it justified its non-statutory fault rule as follows:

> They (plaintiffs) find fault with the Soya Atlantic on the ground that her lookout, engaged in securing the ladder which had been used by the pilot to go over her side, had not returned to his post, while the Soya Atlantic's Master, her First Officer and her helmsman, along on her bridge, had navigational duties as well as duties of lookout. *The District Court found, however, that the Darby was not unobserved from the Soya Atlantic and that everything was done which would have been done if the lookout had been at his post* adding his observation to that of the Captain and the First Officer. (*United States v. S.S. Soya Atlantic)* (C.A.4 1964) 330 F.2d 732 at page 735 (emphasis supplied))

The Fourth Circuit went on to observe by footnote that "The absence of a lookout having no other duties is not a basis for a finding of fault if the bridge actually observed what a lookout should have seen." (Citing *Osaka Shosen Kaisha Ltd. v. Angelos, Leich & Co., Ltd.* (C.A.4), 301 F.2d 59 at page 61) This sword cuts two ways in the present case. Since the pilot and watchman of M/V Morris Harvey admittedly did *not* observe what a proper bow lookout should have seen had one been posted, their failure to post such an independent forward lookout should have constituted fault. In the present case, the Coast Guard repeatedly promulgated by radio a Notice to Mariners which expressly recommended that commercial towboat operators post lookouts at the heads of their tows while transiting congested areas during the Labor Day weekend. Respondent Madison posted no bow lookout and neither deckhand Andrew Cogis, stationed on the port side of the pilot house, nor pilot Clyde Hammack, stationed to starboard in the pilot house, saw respondent Kessinger's boat until after the collision. A bow lookout, had

one been posted, would have been located more than 595 feet ahead of the pilot house and would consequently have had a 595 foot advantage over the tug's pilot in observing Kessinger's derelict boat. Furthermore, a bow lookout would have been able to see into the M/V Morris Harvey's blind spot, admitted by Madison's own expert witness to be 600 feet long while Coast Guard Captain Kenneth Hofstra proved to a mathematical certainty that the blind spot was over 965 feet long. These matters are physical facts which cannot reasonably be disputed and they are true not just in the present case on its peculiar facts, but in *every* case in which a tug pushes a lengthy tow ahead of it, the more so where the tow consists of empty barges riding high in the water.

II.

Whether the District Court violated the rule established by *Moragne v. States Marine Lines, Inc.*, 90 S.Ct. 1772, 398 U.S. 375, 26 L.Ed. 2d 339, by permitting a defense medical witness to refer extensively to West Virginia's state standards for *prima facie* intoxication in criminal cases and by refusing the petitioners' cautionary instruction which would correctly have advised the jury that petitioners' decedent had committed no criminal offense under state or federal law by having a blood alcohol content of .022 while a guest passenger on a private pleasure boat.

There was no evidence offered that petitioners' decedent's alleged intoxication as a guest passenger proximately caused or contributed to the collision of M/V Morris Harvey and Private Pleasure Boat WV 7830 AB. There was utterly no evidence of intoxication of petitioners' decedent from those who observed him before the collision; in fact, the uncontracdicted evidence of all pas-

sengers on the pontoon boat was that he was fully rational, coherent, and coordinated and that he observed the approaching barges and assisted in attempting to paddle the pontoon boat out of danger.

The District Court should not have allowed Dr. Irvin Sopher to testify that petitioners' deceased was "legally impaired and intoxicated to operate a motor vehicle" according to West Virginia's *prima facie* statutory criminal standards for determining intoxication of motor vehicle operators. (West Virginia Code of 1931, Chapter 17C, Article 5A, Section 5)

Over the petitioners' vigorous objection, Dr. Sopher was allowed to testify to the effect that petitioners' decedent was "legally too drunk" to operate a motor vehicle under West Virginia criminal law. Sopher was also permitted, over the petitioners' objections, to refer repeatedly to the West Virginia motor vehicle operators' *prima facie* criminal standards for determining intoxication (W.V. Code 17C-5A-5) in testifying that the deceased was under the influence of alcohol:

> DOCTOR SOPHER:
> All right .22 percent represents over twice the amount of alcohol allowed *under the law in the State of West Virginia whereby one can operate a motor vehicle without being considered impaired* to operate such a motor vehicle. And that is if a person has a point 10 percent, point 10 percent or greater alcohol in their bodies *while operating a motor vehicle, then they, if arrested and tried are legally impaired and intoxicated* to operate a motor vehicle, that is point 10 percent. In this particular, this is not a motor vehicle situation, but the blood showed an alcohol level in Mr. Ratliff of .22 percent, which is over twice as

> much alcohol in the blood of Mr. Ratliff. *And if he had been driving a motor vehicle, which, of course he wasn't, he would be considered intoxicated, to say the least.*
> (Appendix, pages 46a, 47a)
> (emphasis supplied)

Parenthetically, the West Virginia code section referred to by Dr. Sopher does not apply to boats or watercraft of any kind. (17C-5A-5, West Virginia Code of 1931)

The trial court's rationale in allowing Dr. Sopher's inflammatory testimony regarding "arrests," "trials," and "legal impairment" was that it would "illustrate the meaning" of the decedent's blood alcohol level; (Appendix, page 47a, page 48a) however, the testimony wrongly suggested to the jury that the deceased had committed a criminal act under West Virginia law by being intoxicated and further suggested that the deceased was therefore somehow responsible for the operation or control of Kessinger's derelict pontoon boat when, in fact, he was a guest passenger. Dr. Sopher returned to West Virginia's motor vehicle criminal standards for determining *prima facie* intoxication several times in his testimony, thereby grafting onto the federal body of admiralty law an individual state's standards for determining criminal culpability.

Attempting to minimize the effect of this injection of West Virginia substantive law into the proceedings, petitioner took the trial court at its word and offered Plaintiiffs' Requested Charge No. 15, which would have instructed the jury that the West Virginia motor vehicle operators' *prima facie* standards for criminal intoxication were offered by respondent Madison Coal and Supply Company only for illustrative purposes and that West Virginia's criminal standards for legal intoxication do not

apply to passengers or operators of vessels on the Kanawha River, or any other navigable river of the United States.

PLAINTIFF'S REQUESTED CHARGE NO. 15

The Court instructs the jury that, in considering the testimony of Doctor Irvin Sopher and the other evidence and testimony in this case, there is no West Virginia law or regulation and no United States law or regulation which forbids or regulates the consumption of beer or other alcoholic beverage on a navigable river such as the Kanawha River, either by a passenger on a boat or vessel or by the owner or operator of a boat or vessel. In particular, the West Virginia motor vehicle laws have no applicability to a boat or vessel on the waters of the Kanawha River. Doctor Sopher was permitted to refer to the West Virginia motor vehicle laws regarding consumption of alcoholic beverages by the operators of motor vehicles merely for purposes of comparison or illustration and you should draw no inference whatsoever that such laws apply to Holley Michael Ratliff or any other passenger on Paul Kessinger's pontoon boat nor to Paul Kessinger himself, the owner and operator of the pontoon boat.

(Appendix, page 17a)

The trial court erred first in allowing Dr. Sopher's testimony and second in refusing the petitioner's requested cautionary instruction. This violated the clear mandate of *Moragne v. States Marine Lines Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 32 L.Ed.2d 679, by allowing West Virginia's criminal laws to become the standard for judging federal civil liability in a pure admiralty case.

CONCLUSION

It is impossible to justify the Fourth Circuit's decision in *Anthony v. International Paper Company* from the standpoint of public policy. If Madison Coal Company's deckhand had been stationed on the M/V Morris Harvey's lead barge with his two-way radio, rather than in the pilot house where he could drink coffee and chat with the pilot, this collision could have been avoided and two lives would have been spared. Madison Coal Company cannot argue that the hazard was not foreseeable, since the Coast Guard foresaw it and published a Notice to Mariners recommending the posting of bow lookouts on commercial tows. Lengthy blind spots ahead of large tows, invisible to the pilot house, are a maritime fact of life, easily corrected by posting a bow lookout. The present case clearly demonstrates that commercial towboat operators will not take such routine precautions unless they are compelled to do so. The arguable slight additional risk to the deckhand being posted on the tow is easily minimized by inexpensive equipment and a modicum of training. It is uncontroverted that M/V Morris Harvey's watchstanders utterly failed to observe Kessigner's disabled pontoon boat, either visually or by radar, as they must have done had they posted even the most perfunctory of bow lookouts. *Anthony v. International Paper Company* should be overruled as a precedent in favor of the rule of statutory fault followed by all other federal admiralty circuits.

The grossly inflammatory testimony of Madison Coal Company witness, Dr. Irvin Sopher, regarding criminal "arrests," criminal "convictions," and West Virginia's "legal standards for intoxication" injected West Virginia substantive criminal law into this federal admiralty proceeding, materially misleading the jury and making the petitioners' decedent's alleged intoxication the entire focus of the defense.

The petitioner are entitled to a directed verdict of liability against respondent Madison Coal and Supply Company based upon Madison's statutory fault in ignoring the Coast Guard Notice to Mariners by neglecting to post a forward lookout or, at the very least, to a new trial with a proper charge to the jury based upon the better rule that failure to post a special forward lookout constitutes statutory fault.

Respectfuly submitted,

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